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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. XAVIER JAMES FORT, Defendant and Appellant.	E065567 (Super.Ct.No. RIF10003985) OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Aaron Campbell, an associate of defendant's cousin, Thurston Stewart, wanted to get some marijuana from Sylvestre Leyva, the victim, a Hispanic man he met at a hookah bar the previous night. The plan involved picking up defendant, Xavier Fort, because he had a gun, and others, and going to the victim's house in a group to grab the marijuana. At Leyva's house, Samuel Delatorre (who actually owned the marijuana but allowed Leyva to broker the deal), and Leyva came out to meet them and handed Campbell the bag of marijuana. Campbell pulled out a gun and told Leyva and Delatorre to go back into the house. By this time, Leyva's friends came out of the house as Campbell and his group turned to leave in their cars with the marijuana. As Leyva and Delatorre turned to re-enter the house, defendant fired three gunshots into the group of Hispanics, one of which struck and killed Leyva.

Defendant was tried and convicted by a jury of murder (Pen. Code, § 187, subd. (a)),[1] with a special circumstance allegation relating to felony murder (§ 190.2, subd. (a)(17)), and two counts of robbery (§ 211), each charge carrying an allegation that a gun was discharged causing death or great bodily injury. (§ 12022.53, subd. (d).) His first appeal resulted in a reversal for failing to instruct the jury as to lesser included offenses. On remand, the People amended the information to proceed solely on a felony-murder theory of liability. Following retrial, defendant was again convicted of all charges and enhancements, and sentenced to an aggregate term of life without possibility of parole for

[1] All further statutory references are to the Penal Code unless otherwise indicated.

the murder, plus a consecutive term of three years for the robbery of Delatorre and 50 years to life for two of the gun discharge enhancements. Defendant appealed.

On appeal, defendant argues that (1) the amendment of the information seeking retrial solely on felony-murder was barred by the law of the case doctrine and section 1009; (2) in the alternative, the amendment violated section 1009 by depriving defendant of the right to have the jury consider lesser included offenses; (3) the court erred by refusing to instruct on voluntary manslaughter based on imperfect self-defense and overruling defendant's objection to proceeding solely on a felony-murder theory; (4) the court erred by refusing to instruct on self-defense; (5) the court's response to a question from the jury regarding aiding and abetting instructions improperly directed the jury toward a conspiracy theory of liability; and (6) the court's imposition of the second gun discharge enhancement to the robbery count relating to Delatorre violated double jeopardy because the new sentence is harsher than the original sentence imposed. We affirm.

BACKGROUND

1. The Incident

On August 19, 2010, Terrence Harris and Aaron Campbell went to a hookah bar, where Aaron interacted with a Hispanic male who was also present. The Hispanic male was Sylvestre Leyva, Jr. Leyva later sent a text message to Samuel Delatorre, telling him about a party he was having, and asked Delatorre to bring some marijuana. Leyva told

Delatorre he had contact with someone who wanted to buy marijuana, so Leyva asked Delatorre to get about two ounces.

On August 20, 2010, Aaron Campbell was at Jonathan Buckley's house, joined later by two other friends, Chris Baker and Kelton Pounds.[2] Aaron mentioned doing a "lick," a robbery, to get marijuana that night. The target of the robbery was the guy they had met from the hookah lounge the night before.

That same evening, Delatorre brought about an ounce and a half of marijuana to Leyva's residence[3] for the party. While there, someone approached him and said that someone outside was looking for weed, so Delatorre went outside. Out in the front yard, there were approximately three African-American males standing between the grass and the driveway.[4] The African-American males asked about the price of the marijuana and wanted to see it. Leyva had met these individuals previously, so he acted as middleman and negotiated with them about price.

Delatorre went inside and got a small bud of marijuana and took it outside to show the prospective purchasers. The African-American males indicated it smelled good, but they had not brought any money with them, so they needed to go to an ATM. Delatorre

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[2] The individuals in this matter had nicknames: Aaron Campbell was called "Ace," Marcel Oliver was called "PlayZ," Jonathan Buckley was referred to as "JB," Chris Baker was known as "Baker Boy," while Kelton Pounds was known as "KT."

[3] Although referred to has Leyva's residence, it was not furnished and had no electricity.

[4] Four African American males went to the Eastvale residence in total: Aaron Campbell, Terence Harris, Chris Baker, and Kelton Pounds.

was concerned that they intended to steal his marijuana. His suspicion was well founded: the truth was that Campbell's group had intended to rob him of the marijuana but decided to leave because they were outnumbered, instead of snatching the marijuana and running as they had planned.

Instead of going to an ATM, Aaron Campbell and his associates returned to Jonathan Buckley's house to get more people. At Jonathan Buckley's house, they found Genevieve, Marcel Oliver, and Thurston Stewart, defendant's cousin. They discussed getting another gun, and Thurston volunteered that he could get another "burner" from his cousin, the defendant. Thurston called defendant and told defendant he was coming to get him and that they were going to get some weed. Thurston did not mention a robbery, but told defendant that Aaron Campbell wanted to get some weed and wanted to borrow defendant's gun. They rode in two vehicles—Aaron's maroon Honda and Genevieve's grey Malibu—to pick up defendant. Then the group headed in two cars back to Leyva's residence and parked in front of the house on the street.

Delatorre saw a maroon Honda, followed by a greyish Chevy Malibu, stop in front of the house. At least seven or eight people exited the cars and stood in a sort of formation in front of the house. Everyone got out of the cars except two drivers: Genevieve and Kelton Pounds. Defendant stood near a fire hydrant across the street from the house. Campbell, Thurston Stewart and Chris Baker were in front of the house. Delatorre was afraid they intended to take the marijuana. Nevertheless, Delatorre,

followed by Leyva and one other person from the party, went outside, with the marijuana in his hand.

One of the African-American males, Aaron Campbell, approached and said he had the money, asking where was the marijuana. Delatorre took out the marijuana and held it out to Campbell, who took it and asked if it was all there. Then Campbell took two steps back and pulled out a semiautomatic handgun. Campbell then directed Delatorre and Leyva to go back into the house.

Delatorre and Leyva started backing up to the house, and Leyva told Campbell's group that they had messed up, because he knew their homies. As Delatorre began to re-enter the house, Leyva headed back out. Three gunshots rang out from the street area. Delatorre ducked and ran, but Leyva sustained a gunshot to the head and collapsed on the ground in front of the house. He died as a result of the gunshot wound to the head.

Defendant, along with Aaron Campbell and the African-American males, got into the cars and went back to Jonathan Buckley's house where they split up the marijuana. On the drive back to Buckley's house, defendant seemed surprised that he was the one who fired the shot. Defendant left his gun with Thurston at Jonathan Buckley's house. Thurston kept it till the next day, when he gave the gun back to defendant. The following day, defendant gave a backpack containing the gun to his other cousin, Thurston's brother, Keontae Stewart, to hold for him. Keontae gave the gun to his parents, and defendant's mother later turned it over to police. Ballistics testing showed that the bullet that killed Leyva was fired from defendant's gun.

Defendant was interviewed by a detective and arrested after admitting that he had fired the weapon because he panicked when the people in Leyva's house came out screaming.

2. Defendant's Testimony

On August 20, 2010, defendant lived in Eastvale. Thurston Stewart and Thurston's brother Keontae Stewart, are his cousins. He knew Chris Baker from high school, but he did not know Terrence Harris, Kelton Pounds, Marcel Oliver, or Genevieve until the night of the robbery, although he knew Genevieve hung out with Thurston. Defendant had heard of Aaron Campbell before August 20, 2010, but had only met him a couple of times. He was aware that Campbell was his cousin's friend, and had overheard discussions about Campbell "doing licks," that is, committing robberies.

On August 20, 2010, defendant received a telephone call from Thurston, who invited defendant to hang out, telling defendant there would be "loads of grams," of marijuana. Defendant looked out his window and saw a car that looked like Genevieve's, and figured there was a party; he had no idea they were going to commit a robbery. Thurston came in and said, "Let's go," after greeting defendant's mother. Defendant denied being told by Thurston that Campbell needed a "burner" to go get some marijuana, but when he left with Thurston he took his .357 magnum revolver with him in his waist band, because he always took it with him for protection.

Defendant and Thurston got into Campbell's red car, where defendant saw Campbell, Baker, and Kelton Pounds. Defendant thought they were headed for a party.

After defendant got into the car, they pulled off followed by the second car (Genevieve's). They drove to the victim's house and parked, remaining in the car while Campbell exchanged text messages with someone. Then, everyone got out of the car. Defendant felt like something was not right.

After the group exited the cars, everyone else walked towards the house, but defendant went across the street. The men who accompanied defendant stood facing the house on the grass in a formation, but the house was dark and there was no music playing, which did not seem right to defendant.

Someone came out of the house indicating he wanted to talk to the person who had wanted the weed, followed by a lot of other people. Campbell walked up to meet them with two or three other people behind him. Defendant started walking across the street, towards the car, because he saw his cousin move, but could not hear what was said between the two groups. Defendant realized that this was no party and he just wanted to get home. Defendant saw the person from the house hand marijuana to Campbell, and right after that he saw Campbell pull out a gun. The people with Campbell started backing up and going towards the cars as Leyva and his companions backed towards the house. Defendant was still in the street.

While he was still in the street, defendant saw people start to come out of the house screaming, "Gun, gun, get the gun." Defendant was shocked at what he had seen Campbell do, and was concerned that Campbell and the others with whom he had arrived

were leaving without him. Defendant pulled his gun out as the others got into the cars and the red car drove off.

With the group of people coming out of the house screaming about the gun, defendant did not know what he was doing; he had just seen the victim get robbed and reacted out of panic as they ran towards him and did not realize what he had done or that anyone had been shot. He fired his gun two or three times, not aiming at anything or anyone. Then he got into the car and they drove back to Buckley's house. On the way, defendant checked his gun, not thinking he had fired it, but he could not see anything because it was dark. At Buckley's house, however, he looked at it again and realized that rounds had been fired.

Defendant stayed at Buckley's house for a while, smoked some marijuana, and then got a ride home from Genevieve, leaving his gun with his cousin. The next day he heard what had happened; Thurston gave the gun back to him, so defendant gave it to his other cousin, Keontae. Two days later, he was arrested.

3. Procedural History

Defendant was charged with murder (§ 187, subd. (a)), with a special circumstance allegation that the killing occurred during the commission of a robbery (§ 190.2, subd. (a)(17)), and that a firearm was discharged causing death. (§ 12022.53, subd. (d).) He was also charged in separate counts with the robberies of Leyva and Delatorre, with gun discharge enhancements added to each count. (See *People v. Campbell* (2015) 233 Cal.App.4th 148, 151.) He was convicted of all charges and

sentenced to state prison for an aggregate term of life without the possibility of parole for the murder, with a consecutive term of 25 years to life for the gun discharge enhancement (§ 12022.53, subd. (d)), consecutive to a determinate term of three years for one of the robbery counts, with a stay of the remaining count and enhancements, pursuant to section 654.[5] The convictions were reversed as to defendant because the court failed to instruct the jury as to the lesser included offenses. (*People v. Campbell, supra,* 233 Cal.App.4th at p. 151)

On remand for retrial, the People amended the information to clarify that the sole theory of murder liability was that pertaining to felony murder liability. There was no objection to the amendment, and defendant was retried on all charges. Following retrial, defendant was again convicted of all charges.

At sentencing, probation was denied and defendant was committed to state prison for life without possibility of parole, plus a consecutive term of 25 years to life, for the special circumstance murder of Leyva and the gun discharge enhancement on count 1. The court stayed the sentence and enhancement as to count 2, the robbery of Leyva, but imposed a consecutive term of three years for the robbery of Delatorre consecutive to the enhancement of 25 years to life for the gun discharge enhancement in count 3. The total term was three years, with a consecutive term of 50 years to life, consecutive to life without the possibility of parole.

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[5] We have taken judicial notice of the records and files in the first appeal, *People v. Campbell, et al.*, E055528, pursuant to Evidence Code sections 452 and 459, because the published opinion from that appeal is silent as to the sentence imposed.

Defendant timely appealed.

DISCUSSION

1. Retrial on Amended Information on Remand to Allege a Sole Theory of Felony Murder.

Defendant raises three related issues respecting the propriety of the amendment of the information to reflect the People's intention to rely solely on a felony-murder theory. By way of procedural background, the amended information was filed on September 11, 2015. The court asked defense counsel if he had received a copy of the amended information, to which defense counsel responded he had just seen it. The court asked if defendant wanted to enter not guilty pleas and denials, and the defendant entered not guilty pleas and denials. Defendant did not object to the order granting leave to amend the information or demur to the amended information on grounds related to law of the case, structural error, or violation of due process.

After the case was closed to evidence, and the parties began discussion of instructions, defendant requested instructions on self-defense and imperfect self-defense, notwithstanding the People's argument that such instructions were inapplicable to felony murder. After more argument relating to the inapplicability of theories of self-defense and imperfect self-defense in felony murder cases, defendant objected to proceeding solely on the felony murder theory. The trial court overruled the objection stating that the prosecution has considerable charging discretion.

A. *General Principles Governing Amendments*

Section 1009 provides, in pertinent part, that the court may order or permit an amendment of an information at any stage of the proceedings. The questions of whether the prosecution should be permitted to amend the information and whether a continuance should be granted to prevent prejudice to the defendant's substantial rights are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

The pre-eminent due process principle is that the accused must be informed of the nature and cause of the accusation. (U.S. Const., 6th and 14th Amends.; Cal.Const., art. I, § 15; *People v. Torres* (2011) 198 Cal.App.4th 1131, 1139-1140.) A defendant's due process rights are not prejudiced by amendment of the information, and the trial court may permit amendment of the accusatory pleading "at any stage of the proceeding, up to and including the close of trial," so long as the defendant's substantial rights are not prejudiced (*People v. Graff* (2009) 170 Cal.App.4th 345, 361), and he is not charged with an offense not shown by the evidence taken at the preliminary examination. (§ 1009; *People v. Winters* (1990) 221 Cal.App.3d 997, 1003.) "Any stage" includes proceedings on remand following a reversal of a judgment, provided the amendment does not change the offense charged or otherwise prejudice the substantial rights of the defendant. (*People v. Chadd* (1981) 28 Cal.3d 739, 758.)

Here, generic murder pursuant to section 187, subdivision (a), was charged, and the felony murder theory was pled as a special circumstance in the first trial. The jury in

the first trial was instructed that it could find defendant guilty of first degree murder pursuant to the felony murder theory, under an aider-abettor theory, or under an uncharged conspiracy theory. In his reply brief, defendant acknowledges that the issue here does not involve a question of notice.

Defendant argues that the amendment limiting the theory of liability to felony murder wrought a change of the offense charged. The test applied is whether or not the amendment changes the offense charged to one not shown by the evidence taken at the preliminary examination. (*People v. Kane* (1984) 150 Cal.App.3d 523, 532; *Patterson v. Municipal Court* (1971) 17 Cal.App.3d 84, 88.) Thus, section 1009 does not prohibit the addition of *any* new charges; instead, the statute precludes the addition of offenses not shown by the evidence taken at the preliminary examination. (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 424; *People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

Defendant concedes that a reversal for retrial places the parties in the trial court in the same position as if the cause had never been tried. (§§ 1180, 1262; *People v. Eroshevich* (2014) 60 Cal.4th 583, 593-594; *People v. Moore* (2006) 39 Cal.4th 168, 174, citing *People v. Barragan* (2004) 32 Cal.4th 236, 247.) In such situations, an accusatory pleading may be amended with leave of court "for any defect or insufficiency," so long as the amendment does not "change the offense charged." (§ 1009; *People v. Chadd*, *supra*, 28 Cal.3d at p. 758.)

The test for whether the amendment has "change[d] the offense charged" is whether the offense was supported by the evidence at the preliminary hearing (see *People*

v. Williams (1997) 56 Cal.App.4th 927, 932; *People v. Winters* (1990) 221 Cal.App.3d 997, 1004), or arose out of the transaction upon which the commitment was based. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 165-166.) The pre-eminent due process principle is that the accused be informed of the nature and cause of the accusation. (U.S. Const., 6th Amend.; *People v. Torres* (2011) 198 Cal.App.4th 1131, 1139-1140.)

To illustrate, in *People v. Kellin* (1962) 209 Cal.App.2d 574, the defendant was charged with grand theft occurring on a specific date and the evidence adduced at the preliminary hearing showed theft of a check for $2,093 on that particular date. At trial, the prosecution offered evidence of three additional checks stolen on different dates and at the close of the prosecution's case, the People were permitted to amend the information to add those checks as counts. On appeal, the conviction was reversed because each of the additional checks represented a "separate and distinct transaction," not related to the charge that formed the basis of the order of commitment after the preliminary hearing. (*Id.*, at p. 576.)

Here, evidence of the killing of Leyva during the marijuana robbery was presented in the preliminary hearing, and felony-murder was a theory included in the original information, identical to the incident that was the subject of the testimony at the retrial. The original information, accusing defendant of murder in general statutory terms, left open the possibility that defendant committed generic murder, for which the jury would need to be instructed as to lesser included offenses. The amendment on remand, limiting the theory to felony-murder, did not "change" the offense charged; it was always alleged

as a special circumstance that the murder was committed in the course of a robbery. The amendment merely ruled out other species of murder.

Murder was charged in both the original information and in the amended version following remand. Thus, the nature of the offense was not changed, and defendant does not claim that the amended information added a charge not shown by the evidence presented at the preliminary hearing. The amendment did not implicate defendant's due process rights or constitute an abuse of discretion.

We turn now to defendant's more specific assertions of error.

B. *Whether the Court Erred in Overruling Defendant's Objection to Proceeding Solely on a Felony-Murder Theory Because It Violated the Law of the Case Doctrine.*

Defendant argues that the amendment violated his substantial rights and it permitted the People to reframe the charges in violation of the law of the case doctrine. We disagree.

The law of the case doctrine does not prohibit amendments which comport with section 1009. It simply states that the principle or rule stated in an opinion by an appellate court in deciding an appeal must be adhered to throughout its subsequent progress. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893.)

However, the doctrine only governs the principles of law laid down by an appellate court, and does not limit the new evidence a party may introduce on retrial. (*People v. Boyer* (2006) 38 Cal.4th 412, 442.) The law of the case doctrine prevents

parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 429.) It is a rule of procedure that applies only if the issue was actually presented to and determined by the appellate court. (*People v. Gray* (2005) 37 Cal.4th 168, 197; *People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273.)

Here, there were changed circumstances. In the first appeal, the information charged first degree murder with deliberation, premeditation, and malice aforethought, but the jury was instructed only on felony murder culpability, without being instructed on lesser included offenses. (*People v. Campbell, supra,* 233 Cal.App.4th at pp. 151, 157-162.) The prior appeal involved no issues relating to whether the People were permitted to amend the information or to seek to limit the theory of guilt to a theory of felony murder. Because we did not decide that issue, there is no reconsideration in this appeal of an issue already decided in the first appeal.

Additionally, the prior appeal did not reverse the conviction on the ground there was insufficient evidence to support a theory of felony-murder, which was one of two alternative theories of guilt for the murder in the first trial. See *People v. Cooper* (2007) 149 Cal.App.4th 500, 525 [no violation of law of the case doctrine where defendant was retried for murder notwithstanding U.S. District Court ruling on habeas, questioning sufficiency of evidence where different evidence was adduced at second trial].) While law of the case principles may come into play if, upon remand, the People attempted to prove an allegation using only evidence presented at the first trial resulting in a finding of

insufficiency (see *People v. Scott* (2000) 85 Cal.App.4th 905, 924 [involving retrial of a prior conviction allegation which was reversed for insufficiency of evidence]), the same is not true where the legal theory of guilt has changed.

The issue presented here was neither litigated nor decided in the earlier appeal, so the law of the case doctrine did not preclude the amendment.

C. *Whether the Amendment Violated Defendant's Constitutional Rights and Deprived Him of an Effective Appeal.*

Defendants assertion that the amendment deprived him of "substantial constitutional rights to due process of law, a fair jury trial, and effective appellate relief" is supported by reference to the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution without relevant analysis or decisional authority to show that the amendment, which was otherwise permissible, resulted in such violations. Defendant's right to a jury trial was not violated because he was afforded a jury trial and the jury was instructed on the law relative to the charged offenses. His Sixth Amendment rights were not violated because he was represented by counsel and had a speedy, public trial.

Defendant also claims that the amendment of the information deprived him of effective appellate relief, and that "the promise of meaningful appellate relief becomes empty and illusory while the risk of infringing on the constitutional right to freedom from double jeopardy becomes unacceptably heightened," citing *People v. Phillips* (1969) 270 Cal.App.2d 381, 385. However, the *Phillips* case rejected a claim that retrial implicates double jeopardy principles because, pursuant to section 1262, an unqualified reversal

places the parties in the same position as if the cause had never been tried.[6] The court there went on to state, "The defendant who is successful in obtaining such a reversal does not gain immunity from further prosecution but subjects himself to a retrial that may reach the same result. [Citations.]" (*Ibid.*)

Defendant concludes from his selected quotation that he was entitled to a jury trial where the jury would have to consider the same issues, which he interprets to mean that retrial was limited to the original theory of guilt presented in the first trial. This is illogical in light of the affirmative authorities permitting amendment following reversal for retrial, and the notion that the parties are placed in the same position as if the cause had never been tried. The fact that defendant has cited no authority for the faulty premise that the People are precluded from changing the theory of guilt on retrial reflects that there is no authority. If we were to adopt defendant's reasoning, retrial would become meaningless, preventing both parties from adapting tactics on remand.

The amendment did not deprive defendant of his constitutional rights, or his right to an effective appeal.

D. *Whether Permitting the Amendment Constituted Structural Error.*

Defendant argues that the amendment constituted structural error, necessitating reversal per se. However, the term "structural error," for which reversal per se is required, refers to certain federal constitutional errors that will always invalidate a

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[6] Of course, a different conclusion would be compelled if we had reversed the murder conviction due to insufficient evidence to support the judgment. (See *Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141].)

conviction. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

Assuming an error has been committed, categorization of an error as structural represents "the exception and not the rule." (*Rose v. Clark* (1986) 478 U.S. 570, 578 [92 L.Ed.2d 460, 106, S.Ct. 3101]; see also, *People v. Sivongxxay* (2017) 3 Cal.5th 151, 178.) Despite the strong interests supporting the harmless-error doctrine, the court in *Chapman v. California* (1967) 386 U.S. 18, at page 23, footnote 8, recognized that some constitutional errors require reversal without regard to the evidence in the particular case, citing *Payne v. Arkansas* (1958) 356 U.S. 560. For example, the complete denial of the right to counsel or a trial before a biased judge requires reversal. (*Rose v. Clark*, *supra*, at p. 577, citing *Gideon v. Wainwright* (1963) 372 U.S. 335 and *Tumey v. Ohio* (1927) 273 U.S. 510.) Those errors necessarily involve violations of fundamental rights, specifically, rights guaranteed under the first eight amendments to the United States Constitution, made applicable to the states by the Fourteenth Amendment. (See *Gideon v. Wainwright*, *supra*, 372 U.S. at p. 341.)

To determine whether a federal constitutional error is structural, courts ask whether the error rendered the trial "fundamentally unfair or an unreliable vehicle for determining guilt or innocence" (*Neder v. United States* (1999) 527 U.S. 1, 9 [144 L.Ed. 2d 35, 119 S. Ct. 1827]), or whether the effect of the error is "necessarily unquantifiable and indeterminate." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [124 L. Ed. 2d 182, 113 S. Ct. 2078]; see also, *People v. Aranda* (2012) 55 Cal.4th 342, 366.)

The fact that an error implicates important constitutional rights does not necessarily make it structural. (*People v. Sivongxxay, supra,* 3 Cal.5th at p. 179.) Many statutes set out procedures designed to protect constitutional principles, but constitute procedural error or trial court error, and not structural error. (*Id.,* at pp. 178-179, citing *People v. Anzalone* (2013) 56 Cal.4th 545, 555-556.)

Structural error has been found when the trial court instructed the jury to presume malice, essentially directing a verdict for the prosecution (*Rose v. Clark, supra,* 478 U.S. at p. 578), or failed to properly instruct the jury on its duty to find defendant guilty beyond a reasonable doubt (see, *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 280-281; *Cage v. Louisiana* (1990) 498 U.S. 39, 41 [112 L.Ed. 2d 339, 111 S.Ct. 328] [*per curiam*]), excluded grand jurors based on their race (*Vasquez v. Hillery* (1986) 474 U.S. 254 [88 L.Ed.2d 598, 106 S.Ct. 617]), infringed on the right to self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168 [79 L.Ed.2d 122, 104 S.Ct. 944]), or denied the right to a public trial. (*Waller v. Georgia* (1984) 467 U.S. 39 [81 L.Ed.2d 31, 104 S.Ct. 2210].) Such errors affect "the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [113 L.Ed.2d 302, 111 S.Ct. 1246].)

Here, the defendant has not demonstrated any violation of his constitutional rights, much less a violation of a fundamental right as found in the first eight amendments to the federal Constitution. Thus, he cannot establish structural error. He presupposes he had a federal constitutional right to be tried on the identical theory in the second trial as he was in the first trial, as a due process right, and that the amendment to the information

deprived him of the appellate relief obtained on review of the first trial. Unfortunately, he has not established a federal constitutional right to be tried on the same theory on remand. The linchpin for application of the structural error rule is the prerequisite determination that federal constitutional error has been committed which rendered his trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

In the present case, no abuse of discretion occurred. Defendant asserts that because he was not retried on the same theory as he was tried in the first place, he suffered from an error of constitutional dimension. However, as we have pointed out, there was no due process violation, and he has not established that he had a constitutional right to a jury trial on the same theory of homicide, so he has not articulated a violation of his right to a jury trial on that theory.

Simply asserting that the improper amendment constituted structural error does not establish that an amendment violated a fundamental federal constitutional guarantee. Moreover, to say that these rights were "implicated by the granting of a new trial," does not entitle one to a reversal per se. No other federal constitutional error has been articulated, and no structural error has been demonstrated.

E. *Whether Permitting the Amendment Deprived the Defendant of a Retrial Before a Jury Instructed on Lesser Offenses*

Defendant argues that by permitting the amendment to the information, limiting the theory of the homicide to that of felony murder on retrial, defendant was deprived of the right to have the jury instructed on lesser offenses included in the charge of murder,

which was the basis for the reversal of his conviction following the first trial. Defendant incorporates his other arguments as to how the amendment prejudiced his rights, which we have previously addressed. Nevertheless, from that position, defendant argues that because his substantial rights were prejudiced, section 1009 precluded the amendment.

The People were authorized to amend the information, which was done without objection. The fact that the amendment, limiting the theory of homicide to felony-murder, meant that the defendant was not entitled to instructions on the lesser included offenses of malice-murder does not constitute the type of prejudice for which section 1009 would preclude an amendment, and defendant cites no authority compelling a different conclusion.

2. Instructional Error

A. *Refusal to Instruct on Voluntary Manslaughter Based on Imperfect Self-Defense as a Lesser Included Offense Within First Degree Murder, or Self-Defense*

Defendant argues that the court erred by refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense as a lesser included offense to first degree murder, and overruling his objection to proceeding solely on a felony murder theory. He also argues the court erred in denying his request for instructions on self-defense. Neither point has merit.

As to defendant's objection to proceeding solely on a felony murder theory, we have previously discussed why that was permissible and not precluded by the law of the

case doctrine or due process. Having determined that the amendment was proper, it was not an abuse of discretion to overrule defendant's objection—interposed well after the amendment was filed and defendant was arraigned thereon—to proceeding solely on the felony-murder theory.

In light of the permissible amendment, the defendant was not tried on both a felony-murder theory and a theory of malice-murder. If defendant had been tried on the alternative theories, as he was in the first trial, the trial court would have been required to instruct on the lesser included offenses within the charge of malice-murder. (See, *People v. Campbell, supra,* 233 Cal.App.4th at p. 160, fn.4; see also, *People v. Anderson* (2006) 141 Cal.App.4th 430, 445.) Where, however, the information did not have "malice aforethought" language, the trial court was not required to instruct on second degree murder.[7] (*People v. Huynh* (2012) 212 Cal.App.4th 285, 313-315.)

Contrary to defendant's position, the duty to instruct on lesser included offenses *is* linked to the allegations of the accusatory pleading. In fact, that was the basis for our reversal of the judgment in the first appeal. There, the accusatory pleading included allegations of malice-murder as well as felony-murder, obligating the trial court to instruct on the elements, defenses, and lesser included offenses of both species of murder. After the remand, and the People's amendment, the accusatory pleading did not allege a malice murder theory for which the instructions on lesser offenses and defenses would have been appropriate.

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[7] In trial, defendant did not request instructions on voluntary manslaughter, although he did request instructions on imperfect self-defense.

As for the duty to instruct on defenses to murder, specifically self-defense, the rule has long been established that the duty to give instructions on particular defenses arises only if it appears that defendant is relying on such a defense or if there is substantial evidence supportive of such a defense, and the defense is not inconsistent with the defendant's theory of the case. (*People v. Brooks* (2017) 3 Cal.5th 1, 73, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 715, 716, overruled on a different point in *People v. Breverman* (1998) 19 Cal.4th 142, 149, 163, fn. 10.) There are three problems with defendant's claim of error in failing to instruct on self-defense.

First, insofar as defendant was charged only with felony-murder, self-defense is not a valid defense to robbery.[8] Second, there is no evidence to support a theory of self-defense. Attempting to assert that self-defense was a viable theory, he acknowledges that self-defense is not available to the direct perpetrator, citing *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170, and attempts to draw a distinction between the actual robber and those who aid and abet the robbery in asserting that because defendant was not acting in furtherance of the common design of robbery, he was entitled to claim self-defense. Defendant cites *People v. Martin* (1938) 12 Cal.2d 466 and *People v. Perry* (1925) 195 Cal. 623, for the proposition that the killer and accomplice to be jointly engaged in the felony at the time of the killing as support for this proposition.

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[8] The People point out that defendant's brief does not explain why he was entitled to a self-defense instruction for the robbery counts, and argues that, as to those counts, the argument has been forfeited, citing *People v. Stanley* (1995) 10 Cal.4th 764, 793. Defendant does not pursue the point, so we will not address that particular question.

The *Loustaunau* case does not distinguish the liability of the actual perpetrator from that of aiders and abettors as defendant suggests, and the policy explained there undermines defendant's position. As the court in *Loustaunau* pointed out, the purpose of the felony-murder rule is to deter even accidental killings in the commission of designated felonies by holding the felon strictly liable for murder. (*People v. Loustaunau, supra,* 181 Cal.App.3d at p. 170.) Found to be an aider-abettor or a co-conspirator, defendant was "in for a penny, in for a pound" (see *People v. Martinez* (1982) 132 Cal.App.3d 119, 140), and not entitled to invoke either self-defense or imperfect self-defense. (*People v. Elmore* (2014) 59 Cal.4th 121, 134, fn. 6; see also, *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [explaining that if death results from the commission of an enumerated felony, "'it will be first degree murder, regardless of the circumstances.'"], citing *People v. Burton* (1971) 6 Cal.3d 375, 387-388 [overruled on a different point in *People v. Lessie* (2010) 47 Cal.4th 1152, 1156].)

The defense theory was that defendant did not join the conspiracy because he was unaware that Campbell intended to carry out a robbery, and both sides agreed in limine that if the jury did not agree defendant aided and abetted the robbery, he would not be guilty of murder. The defendant's testimony was that he thought he was on his way to a party and had no idea a robbery had been planned. There was no evidence to support a theory that defendant was guilty of a lesser offense, and the court properly refused to instruct the jury on lesser included offenses or on self-defense.

B. *Error in Referring to Conspiracy Instructions When Responding to Jury Question on Aiding and Abetting Instruction.*

During jury deliberations, a question was sent to the court asking, "If saying 'No' to 'the defendant knew that the perpetrator intended to commit the crime' when determining if he was an aider & abettor – Does that mean he cannot be charged with murder." After discussions with the prosecutor and the defense attorney, the court responded to the jury question by saying, "If you find the defendant did not know that the perpetrator intended to commit the target crime, the defendant cannot be convicted of that target crime based on an aiding and abetting theory. On your final sentence, please re-review instructions 400, 401, 416 (uncharged conspiracy), 418, 420, 540A, 1600 and 1603." Defendant objected to "either section mentioned."

Defendant argues that the court improperly responded to a jury question about aiding and abetting by referring the jury to conspiracy instructions. The effect, defendant asserts, was to direct the jury toward a conspiracy theory of liability that was neither mentioned nor encompassed in the scope of the jury's inquiry. We disagree.

Section 1138 imposes upon the court a statutory obligation "to provide the jury with information the jury desires on points of law." (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 127-128, citing *People v. Smithey* (1999) 20 Cal.4th 936, 985.) California Rules of Court, rule 2.1036(b) implements this policy by providing that if the jury determines that further action might assist the jury in reaching a verdict, the judge may: (1) Give additional instructions; (2) Clarify previous instructions; (3) Permit

attorneys to make additional closing arguments; or (4) Employ any combination of these measures. (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1087.)

The trial court has discretion when choosing whether to resort to the tools provided and how to use those tools. (*People v. Salazar, supra,* 227 Cal.App.4th at p. 1088.) In reviewing a claim of instructional error, the ultimate question is whether there is a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled on a different point in *People v. Rangel* (2016)62 Cal 4th 1192, 1216.) We apply the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury. (*People v. Waidla* (2000) 22 Cal. 4th 690, 745-746.)

The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1220, citing *People v. Burgener* (1986) 41 Cal.3d 505, 538 [disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756].) "'"Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."' [Citations.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Defendant does not claim that any of the instructions were erroneous; he claims only that by mentioning CALCRIM 416, the court improperly directed the jury to a conspiracy theory of liability. However, CALCRIM No. 416 was merely one of several

instructions to which the court made reference. Further, that instruction is required to be given, *sua sponte*, in any case where the prosecution has not charged the crime of conspiracy but has introduced hearsay statements of co-conspirators. (*People v. Ditson* (1962) 57 Cal.2d 415, 447; see also, *People v. Davis* (1957) 48 Cal.2d 241, 250; *People v. Wallace* (1970) 13 Cal.App.3d 608, 616.)

The court merely listed the instruction by number, and did nothing to emphasize how it should influence the jury in its deliberations. However, had it failed to mention it in the response to the jury's question, the omission of CALCRIM 416 also might have improperly influenced the deliberations, by negating the existence of an agreement among the group to rob the victim of his marijuana.

While the jury was instructed on aider-abettor principal liability, the People patently relied on a theory that the robbery was committed as part of an agreement, and the jury had been instructed on it as well. In response to the jury's question, the court merely referred the panel to the range of instructions relevant to their inquiry, with the understanding that if the jury concluded defendant could not be convicted of murder whether the jury found he was unaware of Campbell's intent to rob as an aider-abettor, or whether it found he was not party to the conspiracy. There was no abuse of discretion.

C. *Whether the Court Abused Discretion by Imposing the Firearm Enhancement to Count Three, or Violated Double Jeopardy Principles by Punishing Defendant More Harshly; Whether the Enhancement Should Have Been Stayed Pursuant to Section 654.*

Upon defendant's conviction in his first trial, the trial court imposed the following sentence: count 1, life without possibility of parole, with a consecutive term of 25 years to life for the gun discharge enhancement (§ 12022.53, subd. (d)); count 2, both the sentence and the gun discharge enhancement were stayed pursuant to section 654; and count 3, the court imposed a consecutive term of 3 years for robbery, but stayed the gun discharge enhancement. His total sentence was 3 years (determinate) plus life without the possibility of parole, plus 25 years to life. Defendant appealed from that judgment, which was reversed on the ground that the trial court erred in failing to instruct on lesser offenses to malice murder.

Following retrial, defendant was again convicted on all counts. At sentencing, defense counsel argued that defendant should not be sentenced more harshly after the prior appeal. The court continued the matter to determine what might or might not be stayed. When proceedings resumed, the People noted that because there were multiple victims, a consecutive term was required for count 2, and that staying the enhancement to count 3 would be an unauthorized sentence. Thereafter, the court imposed a term of life without possibility of parole for count 1, plus a consecutive 25 years-to-life enhancement for the gun discharge enhancement, stayed the sentence and enhancement for count 2

pursuant to section 654, and imposed the middle term of 3 years consecutive for count 3, plus 25 years to life for the gun discharge enhancement.

On appeal, defendant argues that the court abused its discretion when it imposed the firearm enhancement to count 3, rather than staying it pursuant to section 654, thereby violating double jeopardy principles by increasing the sentence following a successful appeal. We disagree.

Section 12022.53, subdivision (d), provides that "[n]otwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

The legislative intent behind this section was expressly declared to impose substantially longer prison sentences on felons who use firearms in the commission of their crimes in order to protect citizens and deter violent crime. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172, citing Stats. 1997, ch. 503, § 1.) The stated purpose is implemented by providing for progressively longer prison sentences on felons who use firearms in the commission of enumerated crimes, the most severe of which is that provided by section 12022.53, subdivision (d). (*People v. Frausto* (2009) 180 Cal.App.4th 890, 898.)

Defendant acknowledges case law that does not favor his position. First, section 654 does not preclude the imposition of multiple enhancements pursuant to section 12022.53 based upon a single injury. (*People v. Palacios* (2007) 41 Cal.4th 720, 727-728; *People v. Oates* (2004) 32 Cal.4th 1048, 1065-1066.) But he has framed the issue in a way that assumes the decision to impose the enhancement is discretionary. It is not. Subdivision (g) of section 12022.53 prohibits probation or suspension of execution or imposition of the enhancement, and subdivision (h) of the section eliminates judicial discretion to strike the enhancement pursuant to section 1385. Imposition of a consecutive enhancement is mandatory. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363.) Where the imposition of the sentence enhancement is mandatory, any failure to impose it would create an unauthorized sentence. (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.)

Ordinarily, a greater sentence may not be imposed upon remand after an appeal. (*People v. Collins* (1978) 21 Cal.3d 208, 216; *People v. Henderson* (1963) 60 Cal.2d 482, 497.) However, this general rule is inapplicable to cases involving unauthorized sentences. (*People v. Panizzon* (1996) 13 Cal.4th 68, 88, citing *People v. Serrato* (1973) 9 Cal.3d 753, 764 [disapproved on other grounds, *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn.1]; see also *People v. Martinez* (2015) 240 Cal.App.4th 1006; *People v. Brown* (1987) 193 Cal.App.3d 957, 961.)

Defendant discharged his weapon three times in the direction of Leyva, Delatorre, and others who were in the process of re-entering the house. Only Leyva was struck and

killed with a projectile fired by defendant. Nevertheless, the offense against Delatorre, whose marijuana was stolen from Leyva in Delatorre's presence with the use of a firearm, required a separate and consecutive term with a separate consecutive gun discharge enhancement because he was a separate victim. Notwithstanding the fact defendant's new sentence is substantially longer than the term imposed after the first trial, the first sentence was unauthorized, warranting the longer term on remand.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.